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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No. 703

JEWELL M. SCHWARTZ, Administratrix of the Estate of EDMUND J. SCHWARTZ, Deceased,
Petitioner,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
a Corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PETITIONER'S STATEMENT OF THE CASE.

We are compelled to take issue with some of petitioner's statements because they are not supported by the record evidence.

On page 7 of the petition, petitioner states: "Decedent's work pertained to maintaining the areas outside of

the tracks within the defendant's right of way in the vicinity of Monett, Missouri."

Decedent was not engaged in maintenance work in the true sense of the word, but had entered into a written contract with the defendant to mow its right of way Miles 91 to 107 (Tr. 15). The Supreme Court of Missouri recognized but did not pass upon defendant's independent contractor defense and said (Pet. 39): "The defendant's principal point of defense on this appeal, as it was at the trial, that Schwartz was not an employee of the defendant but was an independent contractor." Further, the mowing to be performed was in the vicinity of Nevada, Missouri, not Monett, Missouri.

At page 8 of the petition petitioner states: "The decedent was found missing late at night. A search revealed that the mowing machine had toppled over the embankment. Its wheels were in the air (Tr. 39). The plaintiff was pinned beneath the mower east of the tracks in the gulley into which it had fallen." Page 39 of the transcript refers to decedent's tractor, and states categorically that all four wheels of the tractor were up in the air, and the decedent was lying face down and the tractor fender was just above his back.

Then petitioner states (Pet. 9): "There was evidence from which a jury could have found that the decedent while operating this mowing machine had come right up to and in contact with the guy wire and that thereby this accident was caused (Tr. 91)." We submit there is no testimony or even any reference to a mowing machine on the cited page of the transcript. If petitioner now contends

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that the mowing machine caused the fatal injury, then she has abandoned her trial, submission and appeal theory. To illustrate, petitioner's recovery instruction refers specifically to a tractor and says (Tr. 200): "* * * said tractor was caused to and did turn over on and kill deceased * * *."

Nor does petitioner's recovery instruction (Tr. 198, 199, 200) submit or require a jury finding that either the tractor or mowing machine struck the guy wire. The instruction requires this finding (Tr. 200): "* * * said tractor was caused to and did turn over on and kill deceased, while the same was being operated near said guy wire * * *." So again petitioner has shifted her trial theory. Striking a guy wire while operating a tractor is entirely different from operating a tractor in the vicinity of a guy wire. Petitioner is bound by the theory of submission and cannot now disclaim or change it.

Then again (Pet. 10) petitioner states: "There was evidence from which the jury could have found that on other occasions two or more men had been required to perform this work, so that at least one man could move in advance of the machine and discover obstacles and dangers ahead and warn the operator in advance (Tr. 93)."

A reading of pages 92 and 93 conclusively demonstrates that the witness did not testify that he had prior to the accident in question seen a man moving in advance of a tractor with mowing equipment attached mowing the defendant's right of way. The witness testified the year before the accident he saw two parties mowing the right of way with two Fordson tractors (Tr. 92).

The witness' testimony (Tr. 93) that he saw on many occasions two persons mowing the right of way together is of no probative value because there is no showing whether the mowing was being done mechanically or manually. If the work was being done mechanically it is not proper to infer from this evidence that one man moved in advance of the tractor with attached mowing equipment to discover obstacles and dangers and warn the operator in advance.

If the witness meant he saw two men mowing the right of way manually on many occasions, it is immaterial to any of the issues involved. The evidence on this point is too vague and indefinite to be of any probative value. Further it is undisputed that decedent Schwartz was the owner of the tractor and attached mowing equipment.

I.

The Supreme Court of Missouri Did Not Hold That Petitioner Could Not Recover Because of Assumed Risk, but Held That the Evidence Was Insufficient to Support a Finding of Negligence.

Respondent recognizes that assumption of the risk is not a defense under the Federal Employer's Liability Act, consequently did not plead or urge it.

Respondent did urge that there was not any evidence upon which the jury could have found negligence on the part of respondent which contributed in whole or in part to Schwartz' death. 45 U. S. C. A., Sec. 51, *et seq.*

We submit that the decision of the Missouri Supreme Court does not attempt to breathe life into the dead doctrine of assumption of risk, but clearly recognizes its decease

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and final judicial interment, nor did the Court hold a judicial post mortem over this dead doctrine.

The Court's opinion merely holds that Schwartz owned the tractor and attached mowing equipment, he was an experienced tractor operator, that the whole physical set up was open and obvious, that a warning was not necessary, in short under all of the evidence there was insufficient evidence to sustain a finding of negligence, which holding is not contrary to or in conflict with any controlling decision of this Court.

The Missouri Supreme Court bases its opinion upon and follows the doctrine announced in *Eckenrode* v. *Pennsylvania R. Co.*, 164 F 2d 996, which was affirmed by this Court in 335 U. S. 329, 69 S. Ct. 91, 92, wherein this Court said:

> "There is a single question presented to us: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed in whole or in part, to Eckenrode's death? Upon consideration of the record, the court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to petitioner which can sustain a recovery for her."

In *Moore* v. *Chesapeake & O. R. Co.*, 340 U. S. 573, 71 S. Ct. 428, this Court reiterated the rule that to recover under the Federal Employer's Liability Act it is incumbent upon the plaintiff to prove negligence of the defendant which proximately caused the fatal accident. The Court held that the evidence was not sufficient and affirmed the trial court in granting judgment *non obstante veredicto.*

In *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 233, 234, this Court said:

> "The weight of the evidence under the Federal Employer's Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. * * *
>
> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict."

II.

The Petitioner Was Not Deprived of Her Right to Trial by Jury under the Seventh Amendment.

What we have said and the authorities cited under point I is a full and complete answer to petitioner's contention of her deprivation of her right to trial by jury under the Seventh Amendment.

CONCLUSION.

It is respectfully submitted that the petition for the issuance of a writ of certiorari should be denied.

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